

Dkt #5542
filed Jan 12, 1979

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al.,)

Plaintiffs,)

v.)

STATE OF WASHINGTON, et al.,)

Defendants.)

NO. 9213-II

PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT

Plaintiff, United States of America, hereby submits its
Supplemental Memorandum in Support of Motion For Partial Summary
Judgment.

I

INTRODUCTION

In our initial memorandum we contend that the Federal treaty
fishing right involved in this litigation reserves to treaty
tribes a right to have the fishery resource protected from adverse
environmental actions or inactions of the State of Washington. In
support of that contention we set forth and substantiated several
arguments: that the treaty fishing right recognized in Final
Decision No. 1 presupposes a measure of environmental protection
for the salmon/steelhead resource; that the treaties must be
construed to effect the purposes for which they were signed; that

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1 The Supreme Court held that the treaty provision
 2 guaranteeing the right of taking fish "at all usual and accustomed
 3 places, in common with citizens of the Territory"^{21/} "imposed a
 4 servitude"^{22/} in the nature of an easement^{23/} despite the
 5 absence of such a reservation either expressly in the treaty or in
 6 the Federal patents:

7 They [the Indians] were given "the right of
 8 taking fish at all usual and accustomed
 9 places," and the right "of erecting temporary
 10 buildings for curing them." The contingency of
 11 the future ownership of the lands, therefore,
 12 was foreseen and provided for -- in other
 13 words, the Indians were given a right in the
 14 land -- the right of crossing it to the river
 15 -- the right to occupy it to the extent and for
 16 the purpose mentioned. No other conclusion
 17 would give effect to the treaty. (Emphasis
 18 added.)

19 198 U.S. at 381.

20 The effect of Winans on the issue of whether the treaty
 21 fishing right is to be protected from adverse environmental
 22 actions or inactions of the State is four-fold: First, Winans
 23 stands for the proposition that the treaties must be construed to
 24 effectuate the purpose for which they were signed. Just as the
 25 Court in Winans found that a meaningful right to fish included the
 26 right to reach the fishing sites, this Court must find that a
 27 meaningful right to fish means that the State cannot destroy fish
 28 which would otherwise reach those sites. Second, Winans stands
 29 for the notion that direct servitudes which include land-use
 30 restrictions can be imposed on non-Indian land in order to fulfill
 31 Indian reserved rights. Third, in Winans, an easement-like

32 21/ Treaty with the Yakimas, 12 Stat. 951, Article III.

22/ 198 U.S. at 381.

23/ Id., at 384.

servitude was placed on non-Indian land so that Indian people could get to and use traditional fishing sites. In the same manner, we believe that since the right to "take fish" necessarily includes the right to have the fish return to the traditional sites so that they may be taken, the treaties, in a sense, impose an "easement" on all waterways used by salmon and steelhead in their migrations. The blockage or interference with this easement, either physically or through water pollution, is as direct a violation of the treaty right as was the obstruction in Winans. Fourth, Winans holds that the State of Washington cannot license activity which would interfere with the treaty fishing right.^{24/} Likewise, the State cannot authorize activity which would destroy the subject matter of the treaties -- the fish themselves.

2. Winters.

In Winters v. United States,^{25/} the Federal Government brought suit on behalf of the Gros Ventre and Assinboine Tribes of the Fort Belknap Reservation in Montana to enjoin diversions of water from the Milk River by settlers located upstream from the reservation.

The reservation had been established in 1888 as a result of an agreement between the United States and the Tribes. The settlers occupied lands that had been ceded by the Indians in 1888.

The settlers claimed that their diversions had been initiated in 1898, before any use of the Milk River by the Indians or the United States. They also claimed that the purpose of the

^{24/} See also, Tulee v. Washington, 315 U.S. 681 (1942).

^{25/} 207 U.S. 564 (1908).

1 Government in obtaining the 1888 cession from the Indians and
2 opening the lands of their former reservation for entry and
3 settlement under the homestead laws was to encourage the
4 cultivation of those ceded lands by homesteaders and entrymen.
5 The defendants alleged, and the Supreme Court seemed to assume,
6 that if they "are deprived of the waters, their lands cannot be
7 successfully cultivated, and they will become useless and homes
8 cannot be maintained thereon." 207 U.S. at 569.

9 The 1888 agreement said nothing about water, but it did
10 state that the Indians wanted "to become self-supporting, as a
11 pastoral and agricultural people and to educate their children in
12 the paths of civilization." 25 Stat. at 113. Noting the
13 "conflict of implications" between the legitimate expectations of
14 the Indians and the settlers, the Supreme Court nevertheless held
15 that the Tribes had reserved sufficient water for the Indians' use
16 as an implied condition of their grant of land to the United
17 States. Thus, the application of the prior appropriation doctrine
18 to Indian reservations was specifically rejected. The water
19 rights of the reservation did not depend upon the first actual use
20 that was made of the water, but on the purposes for which the
21 reservation was established. The priority of the reservation's
22 appurtenant water right was 1888, the date of the establishment of
23 the reservation.^{26/}

24 To summarize, in Winters, the Supreme Court held that a
25 certain amount of the water of the Milk River was reserved from
26 appropriation under state law despite the absence of any mention
27 of water in the 1888 agreement. These waters were held to have
28

29 ^{26/} The Court's reasoning is quoted in our initial memorandum in
30 support of this motion, pp. 14-15.

1 been reserved for one reason -- because they were necessary to the
2 fulfillment of the purposes of the reservation. In order to
3 effectuate and protect this reservation of water, the defendants
4 were enjoined from any interference with the Indians' water right
5 despite the fact that they had a valid appropriation under state
6 law.

7 The effect of Winters, then, is, in many respects the
8 same as Winans. It holds that Indian treaties must be construed
9 to contain the elements necessary to achieve their purpose. In
10 Winters, a reservation of water was necessary to achieve the
11 purpose of the congressionally ratified agreement with the tribes
12 -- the creation of a permanent home for the Indians. Likewise,
13 the purpose of the six treaties involved in this case can only be
14 achieved by construing them so as to contain the word of the
15 United States that if nature provides the fish -- no one will come
16 between those fish and the treaty fishermen.

17 Winters also reflects Winans in that the case, in a
18 sense, imposes a "servitude" or limitation on the use of
19 non-Indian land in favor of an Indian treaty right. In Winters,
20 the non-Indian upstream landowners were enjoined from withdrawing
21 water from the Milk River until the senior rights of the Indians
22 were met. Similarly, this case seeks to limit non-Indian use of
23 salmon and steelhead habitat and transportation routes at least to
24 the extent that the use interferes with the life cycles of those
25 species.

26 In Puget Sound Gillnetters Assn. v. U.S. Dist. Court, 573
27 F.2d 1123 (9th Cir. 1978), the Ninth Circuit recently reaffirmed
28 the view that with regard to the Indian treaty fishing litigation,
29 water law cases are "the most nearly analogous area of the law."
30 573 F.2d at 1132, fn. 15. The analogy between the holding in
31

1 Winters and the relief being sought in this case is most
2 striking. In Winters, the Supreme Court told the defendant
3 settlers (and, in effect, the State of Montana, since the
4 settlers' water rights were totally based on state law) that they
5 could not interfere with the Indians' senior water rights. In
6 other words, the Supreme Court did not say that the agreement
7 guaranteed the Indians that they would get their full entitlement
8 of water each year (that would depend entirely on the amount of
9 precipitation which fell). But the Court did hold that if the
10 water was present in the river, then the agreement guaranteed that
11 no one would interfere with it before it reached the Indians. A
12 similar ruling must obtain in this case. We do not contend that
13 the treaties guarantee that salmon and steelhead will always be
14 present at the tribes' usual and accustomed grounds and stations.
15 As a natural resource the fish are, by definition, subject to the
16 vagaries of nature. We do contend, however, that if nature
17 provides the fish, no one, not the State or any of her non-treaty
18 citizens, can interfere with those fish before they reach the
19 treaty fishermen. Simply stated, that was the holding in Winters,
20 and it must be applied here.

21
22 3. Washington.

23 Our reliance on Final Decision No. 1 to support the view
24 that the intent of the treaties was to reserve a perpetual fishery
25 for the treaty tribes, and that the State cannot interfere with
26 that right by destroying the subject matter of the treaties, has
27 been discussed at length in our initial memorandum (pp. 6-12), and
28 will not be repeated here. We would, however, by way of summary,
29 specifically draw the Court's attention to the following portions
30 of that decision: 384 F. Supp at 333-334, 337-338, 342; C of L
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1 The tribal watershed reports identified 499 incidents of
 2 habitat damage due to channelization. PE-37 through PE-51.
 3 According to those reports, the impact of channelization is being
 4 especially felt on the Nooksack River, Squalicum Creek, and
 5 Whatcom Creek (PE-37); the Skagit River (PE-38); Montague Creek
 6 and French Creek (PE-39); Thornton Creek, McAleer Creek, Lyon
 7 Creek, Issaquah Creek, Juanita Creek, and especially the Cedar
 8 River (PE-40); the Puyallup River (eighteen miles channelized --
 9 PE-42); the Skokomish River (PE-45); and the Hoh River (PE-49).

11 4. Culverts.

12 We use the term "culvert" to refer to any pipe, conduit,
 13 tunneled drain, arched passageway, or other waterway constructed
 14 to convey water across or beneath a street, highway, railway,
 15 parking lot, or similar area.

16 Since culverts convey water and thus become a part of the
 17 case area waterways, improper culvert placement, size, or gradient
 18 will prevent the upstream migration of salmon and steelhead.

19 Culverts are rarely identified as limiting factors in the
 20 Stream Catalog. See e.g., PE-2, 19 - Lyre Hoko - 601; 20 -
 21 Soleduck Hoh - 05, 401, 1101, 1701.

22 The improper placement of culverts is, however, a chronic
 23 problem in streams supporting migratory fish. The watershed
 24 reports list 136 improperly placed culverts which currently exist
 25 in the case area. PE-37 through PE-51.

27 5. Gravel Removal.

28 According to the Department of Fisheries Stream Catalog:

29 Removal of riverbed materials, particularly
 30 gravel, results in reduced spawning areas and
 31 causes continuous and excessive bed load

V

CONCLUSION

The Indian people of Western Washington and the salmon/steelhead resource have at least one thing in common: it is remarkable that they have survived the onslaught of "civilization." Whether they continue to survive may be determined to some extent by the outcome of this litigation. These Indian people depend on salmon and steelhead. Salmon and steelhead depend on a clean, fresh aquatic environment. That this environment is being degraded and destroyed is attested to by the 2,110 incidents described above.

We have demonstrated that this treaty fishing right is perpetual in nature. We have further established that the tribes have a right to have this fishery resource, the subject matter of the treaty reservation, protected from adverse environmental actions or inactions of the State. We respectfully request that the motion for partial summary judgment be granted.

DATED this 12th day of January, 1979.

Respectfully submitted,

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